Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSEPH GUARINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a search warrant complies with the Fourth Amendment's "Oath or affirmation" clause when its supporting affidavit was not signed by the "John Doe" informant supplying the probable cause information, but a non-contemporaneous affidavit by the judge who issued the warrant states that he considered the under oath statements of the "John Doe" informant prior to issuing the warrant and that it was his usual practice to question such affiants to test their credibility and basis of knowledge.

Whether denying a defendant a hearing to test the recollection and veracity of the state trial judge's assertions that he placed and then questioned the "John Doe" informant under oath, made in a non-contemporaneous and conclusionary affidavit, satisfies the important function of preserving probable cause findings for review.

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2 Wayne R. LaFave, *Search and Seizure*, § 4.3(b) at 465-66 (3d ed. 1996) 9

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals in *United States v. Wilson* (App., *infra*, pp. A1-22) is reported in 169 F.3d 418 (7th Cir. (Ill.) 1999). The opinion of the District Court in *United States v. Guarino* (App., *infra*, pp. B1-10) (No. 96 CR 371, 1996 WL 675768) (N.D. Ill. 1996) is unreported.

JURISDICTION

The Seventh Circuit Court of Appeals filed its opinion on February 17, 1999. Rehearing was denied on March 17, 1999 (App., *infra*, p. D1) The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) (1997).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Statement of Facts.

Cook County Judge Nello P. Gamberdino issued a search warrant for drugs and drug paraphernalia on May 2, 1995, for the persons of Joseph Guarino and Jeremy Wilson, and the residence of 2335 S. Euclid, Berwyn, Illinois. The warrant was executed by Officer Ken Howard and other officers of the Berwyn Police department, as well as by agents from the Bureau of Alcohol, Tobacco and Firearms on May 3, 1995. Items seized included some drugs, but mainly a cache of guns and silencers, some of which served as the basis of the Government's charges in this case. Mr. Guarino was also arrested and made incriminating statements at that time concerning the guns.

The complaint for search warrant (see Appendix) was based on the information allegedly supplied by "John Doe", a confidential informant. The affidavit alleged that the John Doe informant, a self admitted cocaine user, had purchased from and used cocaine with Mr. Guarino and Mr. Wilson in the year prior to the warrant's execution. The affidavit related that the informant had heard that the Defendants had just received a large shipment of cocaine. The informant further related that he used cocaine with Mr. Guarino on May 1, 1995 at the Euclid address, receiving the same feeling he had experienced in his prior cocaine uses. John Doe then saw Mr. Guarino take the package of cocaine to the basement of the house.

The affidavit was written in the first person and attributed as the statements of John Doe. It was signed, however, by Officer Howard. The complaint, although

signed by Howard, did not state that he had been informed of the facts set out in the affidavit by "John Doe". The affidavit contained no statement concerning the past reliability or credibility of "John Doe". There is no indication on the face of the affidavit that "John Doe" was ever sworn.

On June 13, 1996, a federal grand jury indicted defendant Joseph Guarino for violation of 18 U.S.C. § 922(o), illegal possession of machine guns; 26 U.S.C. § 5861(d), illegal possession of firearms; and 21 U.S.C. § 841, possession with intent to distribute cocaine. Jeremy Wilson, the co-defendant in this matter, was similarly charged.

B. How the Questions were Presented.

On September 27, 1996, Mr. Guarino filed an initial motion to suppress evidence, including a request for hearing. On November 19, 1996, the United States District Court Judge George M. Marovich denied Defendant's initial Motion to Suppress Evidence. On May 14, 1997, the District Court denied Defendant's second Motion to Quash and to Suppress Evidence. The District Court admitted that these facts, standing alone, did not satisfy the "oath or affirmation" clause and therefore would render the search of Mr. Guarino's home invalid.

However, the District Court upheld the search. It found that affidavits by Judge Gamberdino and Officer Howard, filed by the Government and made some 17 months after the judge approved the search warrant, stated that "John Doe" appeared before Judge Gamberdino and was questioned under oath. The Gamberdino affidavit did not indicate the source of that knowledge.

The Gamberdino affidavit also stated that it was the Judge's "usual and regular practice" to question confidential informants, and that the Judge may have spoken to the informant in an attempt to assess his credibility. The officer's affidavit stated that he recalled the judge questioning the informant about his credibility and the reliability of the information, although the officer could not remember what questions were asked.

The District Court found the affidavit sufficient. The District Court also found that the complaint for search warrant indicated that "John Doe" was present before Judge Gamberdino when he granted the warrant. Thus, the District Court held, John Doe's appearance and testimony in court, as related by the affidavits, satisfied the "oath or affirmation" requirement because (1) the appearance and testimony subjected the confidential informant to the possibility of prosecution for perjury if he gave false testimony; and (2) it enabled the judge to assess his credibility. (App., *infra*, pp. B6) Neither Judge Gamberdino or Officer Howard testified concerning their recollections. The lower court denied any hearing on the matter in a footnote of its written Order.

On July 28, 1997, Defendant withdrew his plea of guilty and entered a conditional plea of guilty as to Counts 1, 2, and 3 of the indictment. Paragraph 12 of the plea agreement reserved defendant's right to appeal the lower court's order denying his motion to suppress evidence in this case. On November 24, 1997, the District Court sentenced Defendant to a forty-two (42) month term of imprisonment pursuant to the United States Sentencing Guidelines.

The Seventh Circuit Court of Appeals affirmed the District Court's findings. The Court's jurisdiction was invoked under 21 U.S.C. § 1291 (1997). The Appeals Court held that the "procedure followed in this case by the state court complies sufficiently with the oath or affirmation requirement of the Fourth Amendment." (App., *infra*, p. A13) The Court reasoned that the informant's missing signature on the affidavit for search warrant did not, when considered with the officer's and Judge Gamberdino's affidavits, mean that the informant did not swear to the information in the affidavit. The Court below, relying on *Illinois v. Gates*, 462 U.S. 213 (1983), reasoned that reading the affidavit in such a way would be "hypertechnical." (App., *infra*, p. A9) The two affidavits were sufficient to establish that the informant appeared before the state judge and was questioned under oath about the information contained in the affidavit, according to the court. (App., *infra*, pp. A14-16) The Court also relied on the Complaint for search warrant's form language, which stated that the informant appeared before Judge Gamberdino. The Court found that the unsigned affidavit for search warrant, and the two affidavits by Judge Gamberdino and the officer, were sufficient to subject the informant to the possibility of a perjury prosecution if his testimony proved false. (App., *infra*, p. A14)

The Court also found that the two affidavits by Judge Gamberdino and the Officer were satisfactory forms of proof, even though they were executed some 17 months after the informant allegedly appeared before Judge Gamberdino. The Court reasoned that they were sufficient and satisfactory proof of "the regular custom or

practice of judicial officers," a form of evidence that could appropriately stand in for the absence of a contemporaneous record of the proceedings. (App., *infra*, pp. A14-15)

Finally, the Court below held that a hearing where Mr. Guarino could test the recollection of Judge Gamberdino and the Officer through cross examination, was not necessary "[b]ecause Mr. Guarino did not establish that Judge Gamberdino would give testimony under oath different from, and contrary to, his sworn statements in his affidavit . . . " (App., *infra*, p. A16).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT COURT OF APPEALS' DECISION IS CONTRARY TO THE FOURTH AMENDMENT'S REQUIREMENT THAT THE SEARCH WARRANT BE SUPPORTED BY OATH OR AFFIRMATION.

The search warrant at issue in this case did not satisfy the "Oath or affirmation" clause of the Fourth Amendment. The Fourth Amendment dictates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."

Although this Court has never reached the issue of whether an unsigned affidavit for search warrant violates the "Oath or affirmation" clause, several lower courts have, finding in favor of the Petitioner.[1] The Seventh

[1] An Illinois Appellate Court held that where a confidential informant provides unsworn statements in a complaint for

Circuit's decision assumed the unsigned affidavit violated the clause, albeit without so articulating.

Despite the violation, the Seventh Circuit affirmed the lower court's ruling. In so doing, the Seventh Circuit Court of Appeals has determined that state court search warrants with probable cause affidavits unsigned by anonymous confidential informants, and in the absence of any contemporaneous record of proceedings, satisfy the "Oath or affirmation" clause of the Fourth Amendment as long as at some later time, the state trial judge

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search warrant, the warrant violates the Fourth Amendment's "Oath or affirmation" clause. *People v. Dinger*, 106 Ill.App.3d 662, 435 N.E.2d 1348 (4th Dist. 1982). Other court's have reached the same conclusion. *People v. Martinez*, 80 N.Y.2d 549, 607 N.E.2d 775, 592 N.Y.S.2d 628 (1992); *People v. Kleinik*, 233 Ill.App.3d 458, 599 N.E.2d 177 (5th Dist. 1992) (even where the affiant is a police officer, if the judge fails to put the person under oath and/or question the person concerning his statements, the warrant violates the clause); *see United States v. Richardson*, 943 F.2d 547 (5th Cir. 1991) (magistrate's failure to place AUSA under oath, despite asking if the information was true and correct, violated F.R.Crim.P. 41(c)(2)(D) and the Fourth Amendment); *United States v. Evans*, 1993 U.S. App. LEXIS 29992 (6th Cir. 1993) (unpublished opinion); *United States v. Matias, et al.*, 836 F.2d 744, 747 (2nd Cir. 1988); *see United States v. Henry*, 931 F.Supp. 452, 454 (S.D.W.V. 1996) (warrant not invalid when police officer, who was the source of the probable cause information, failed to sign affidavit where he was sworn and signed the actual warrant). Compare *United States v. Hyten*, 5 F.3d 1154 (8th Cir. 1993) (affiant police officer named as such in the complaint, and another officer swears to and signs the affidavit at the direction of the issuing judge, the mere fact that the named officer was not sworn will not invalidate the warrant); *United States v. Vega-Cabrera*, 782 F.2d 1050 (8th Cir. 1985) (officer need only be sworn once, even where new information is added during presentation of complaint).

and the officer provide affidavits saying that the informant appeared before the court, was sworn, and questioned about the contents of the affidavit. The Court of Appeals held that a contemporaneous record may be preferred in such circumstances, but is not constitutionally required. (App., *infra*, p. A13) This holding is imprudent because allowing the use of non-contemporaneous records to establish compliance with the "Oath or affirmation" requirement fosters both potential abuse and reliance on what the search uncovered, rather than on the facts before the issuing court, to justify the search.

This Court has not determined whether the "Oath or affirmation" requirement requires an affidavit for search warrant, or a record made contemporaneously with it, to establish that an anonymous confidential informant was placed under oath prior to the issuance of the warrant.[2] It has held, however, that

> [u]nder the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.

Whiteley v. Warden, 401 U.S. 560, 565 n.8, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). Certainly this requirement arises out

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[2] Some state statutes, however, require a contemporaneous record. *See, e.g., People v. Taylor*, 198 Ill. App. 3d 667, 555 N.E.2d 1218 (3rd Dist. 1990) (warrant issued by judge via telephone invalid where no contemporaneous record kept and therefore no way to determine if complaint was made under oath, in violation of state statute); *People v. Blake*, 266 Ill. App. 3d 232, 640 N.E.2d (2nd Dist. 1994) (reading *Taylor* to so hold). See 725 ILCS 5/108-3 (1997).

of the fear that the police will abuse the process by allowing the information they gain in conducting the illegal search to infect the probable cause determination, creating hydraulic pressure to uphold the search. Surely the same potential for abuse exists when the controversy is over the swearing of the affidavit and information. Here, the potential abuse would involve the police taking advantage of lax and familiar court house practices to obtain search warrants without a swearing. At its most egregious, the Seventh Circuit's approach would allow the police to manufacture affidavits where no informant even exists, confident that when a successful warrant is tested months or even years later, busy judges won't remember who appeared before them and "usual practice" will provide an effectively unrebuttable presumption the informant was present and placed under oath at the time the judge issued the warrant. Thus, the same important Fourth Amendment policies instituted to protect against similar abuses counsel in favor of requiring that what occurred at a warrant proceeding be established by a contemporaneous recording of those proceedings. As Professor LaFave has commented, in agreeing with such a requirement,

> one important function of the warrant requirement 'is to facilitate review of probable cause and avoid justification for a search or an arrest by facts or evidence turned up in the course of their execution.' That function is not being adequately served when search warrants may be upheld solely upon the after-the-fact representations of the police as to what they told the magistrate.

2 Wayne R. LaFave, *Search and Seizure*, § 4.3(b) at 465-66 (3d ed. 1996), *quoting Jones v. United States*, 5 Crim.L.Rptr.

2124 (D.C.Cir. 1969), *rev'd sub nom. on rehearing, Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970). Federal Rule of Criminal Procedure 41 also requires a contemporaneous record of search warrant proceedings, and goes to great lengths to insure contemporaneous recording of events when the warrant is issued upon oral testimony.[3]

Meaningful review of probable cause findings is stymied by not requiring a contemporaneous record of the swearing. It is inconsistent with the constitutional importance of the "Oath or affirmation" requirement to probable cause findings to hold that conclusionary statements in an non-contemporaneous affidavit can prove that the probable cause statements were made under oath. A state court judge's conclusion that it was his usual practice to question the informant to assess the informant's credibility and his basis of knowledge, without being able to recollect any of the questions or answers given, means that a reviewing court cannot assess the under oath statements supporting probable cause. It may review the affidavit, but the affidavit was not sworn to. The statements made under oath cannot be recalled months later. Since no contemporaneous record was made, a reviewing court

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[3] Fed. R. Crim. Proc. 41(c)(1) and (c)(2)(D) concern the issuance of warrants upon affidavit and oral testimony, respectively. Section (c)(1) provides that the judicial officer issuing the warrant "may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceedings shall be taken down by a court reporter or recording equipment and made part of the affidavit." Section (c)(2)(D) requires that the oral statements be recorded, or that a stenographic or longhand record be made.

is left to speculate over whether the under oath statements adequately related facts supporting probable cause or, as pointed out above, whether the informant was present or even existed as the source of the information.

The potential abuses, as well as the limitations on review, inherent in the Seventh Circuit's ruling are demonstrated in this case. The Seventh Circuit found that the affidavits, and in particular Judge Gamberdino's affidavit, showed that the confidential informant was present in court and was questioned under oath concerning the warrant affidavit. (App., *infra*, pp. A14-16) But the actual wording of the affidavit does not indicate whether the Judge had knowledge, independent of the complaint for search warrant, that the informant appeared before him and was sworn. *Id.* When it comes to whether the Judge recalled asking the informant questions concerning the affidavit, his reliability and basis of knowledge under oath, the Judge could only state that it was his "usual and regular practice" to do so. (App., *infra*, p. C6) In effect, these statements indicate that Judge Gamberdino cannot remember if "John Doe" was ever under oath, or whether he asked "John Doe" any questions by which he could judge his veracity or basis of knowledge. Reliance on this kind of evidence opens the door to the abuses noted above. The Fourth Amendment charts a course away from such risks and toward the requirement of a contemporaneous record of warrant proceedings, including the swearing.

II. BY DECIDING THAT THE DEFENDANT IS NOT ENTITLED TO A HEARING UNDER THESE FACTS, THE SEVENTH CIRCUIT IS PRECLUDING MEANINGFUL REVIEW OF FACIALLY INVALID AFFIDAVITS FOR SEARCH WARRANT.

This Court may not be prepared to rule that a contemporaneous record of the swearing requirement is constitutionally mandated. But the important policies noted above should, at a minimum, mandate that Petitioner receive a hearing to test the admittedly ambiguous statements contained in the affidavit.

The strongest argument in favor of requiring testimony, rather than affidavits to establish the swearing is, again, the importance of review. Insuring that a search warrant is issued in compliance with the Fourth Amendment means that it is " . . . the duty of a reviewing court . . . to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) *citing Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). This Court has held that conclusionary statements concerning the existence of probable cause in an affidavit for search warrant do not pass muster. *See Gates*, 462 U.S. at 239 *citing Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

> In large measure, this is because . . . a mere conclusory statement . . . gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow

> that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

Gates, 462 U.S. at 239. Meaningful review of the warrant's affidavit or supporting testimony is the only way courts of review can insure that the judicial officer has performed his constitutionally mandated "neutral and detached" role in the issuance of warrants. *Id.* ("In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.")

The important role review can play in the swearing process was revealed in *United States v. Smith*, 9 F.3d 1007 (2d Cir. 1993). In *Smith*, the court was faced with whether a warrant was invalid because the confidential informant who testified before the state judge was not sworn. The motion court heard the testimony of the state court judge, who related that he did not rely on the confidential informant's testimony, but on the sworn testimony of the police officer. Although not faced with the question of whether the motion court was required to hear the judge's testimony, the Second Circuit relied on the "explicit" nature of the testimony to conclude that a proper swearing occurred. *Smith*, 9 F.3d at 1014.

It is beyond real dispute that the statements in the Judge's affidavit are conclusionary in form and ambiguous in relating the source of the information. The judge's affidavit does not say whether he has independent knowledge that the informant was sworn, or whether he is relying on the warrant document for that information. The Judge could not recall what he asked or

what the informant answered. He contended that he asked and that the informant responded to questions about his veracity and basis of knowledge. The Petitioner should have been allowed to question the judge and establish, with no ambiguity, whether he remembered that the informant was placed under oath, or whether, again, the judge was relying on his custom and practice.

To hold that no hearing is necessary is to effectively preclude any serious review of the swearing process. The meaninglessness of the kind of review precipitated by the Seventh Circuit's approach is revealed by its reliance on the custom and regularity of state court proceedings. If federal courts may rely on mere conclusionary statements of state courts that they usually perform the necessary tasks, they have effectively abandoned any real role in making sure those requirements were complied with: it is tantamount to concluding that if state courts say its occurring, it must be. The same logic would preclude any need for reviewing any portion of the probable cause process as long as the state court insists, in future affidavit, that it heard all the probable cause evidence necessary to final probable cause. This is obviously an ill-advised course.

The Seventh Circuit also found a hearing unnecessary "[b]ecause Mr. Guarino did not establish that Judge Gamberdino would give testimony under oath different from, and contrary to, his sworn statements in his affidavit . . . " (App., *infra*, p. A16). Putting aside for a moment the conclusionary and ambiguous nature of the Judge's affidavit, that demonstrate a sufficient factual dispute, placing the burden on a Defendant to raise a "factual dispute" to obtain a hearing when he was not

even a party to the warrant proceeding seems especially harsh. As this Court is well aware, the warrant process is an *ex parte* proceeding. The only real witnesses to the swearing are those who participate in it. A Defendant can only establish the factual dispute by questioning the witnesses to the swearing. He is simply not privy to that information in any other way.

CONCLUSION

This Court should grant the Petition because the Fourth Amendment requires a contemporaneous record of warrant proceedings to cure a facially defective warrant affidavit. Even if this Court does not so hold, at a minimum, the Fourth Amendment requires a hearing with testimony to preserve meaningful review of the swearing process, an integral part of the probable cause determination.

Respectfully submitted,

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In the
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Nos. 97-4057 & 97-4082

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEREMY WILSON and JOSEPH GUARINO,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CR 371 – **George M. Marovich,** *Judge.*

ARGUED SEPTEMBER 9, 1998 – DECIDED FEBRUARY 17, 1999

Before POSNER, *Chief Judge,* and RIPPLE and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.* After machine guns, firearms, silencers and cocaine were seized from their residence pursuant to a search warrant, Jeremy Wilson and Joseph Guarino entered conditional pleas of guilty to the offenses of illegal possession of those items. Each defendant reserved the right to challenge on appeal the district court's denial of his motion to suppress the evidence resulting from the execution of the warrant. Each defendant also raises a sentencing issue on appeal. For the

reasons that follow, we affirm the judgment of the district court in all respects but one: The court's sentencing determination with respect to Mr. Wilson must be reversed and remanded for a recalculation of his sentence.

I

BACKGROUND

A. Facts

Jeremy Wilson and Joseph Guarino both resided in a house in Berwyn, Illinois. On May 2, 1995, Special Agent Ken Howard, a police officer with the Berwyn Police Department who was assigned to the Metropolitan Enforcement Group of Cook County, Illinois, filed a complaint for a search warrant in order to search Mr. Wilson, Mr. Guarino and their residence. The complaint stated that Special Agent Howard, the complainant, had probable cause to believe that in the house were guns, cocaine, items used to manufacture, distribute and possess cocaine, and currency associated with the sale of narcotics.

The probable cause asserted by the officer was based on the statement of confidential informant John Doe that he had known both Mr. Wilson and Mr. Guarino for more than a year and knew that they sold and used cocaine. The informant, a cocaine user himself for two years, stated that he had bought cocaine from them and had used cocaine with them in the past year. On the day before the complaint was filed, May 1, 1995, when the informant was at their residence, he was told that Mr. Guarino and Mr. Wilson had just received a large amount

of cocaine. John Doe further related that Mr. Guarino brought up from the basement a large, clear plastic bag that contained smaller packages of the powder cocaine and they used it. He stated that he "received the same feeling from snorting the white powder given to me by Guarino and Wilson as I have from snorting cocaine in the past." Guarino R.25, Ex.2 at 2. Mr. Guarino then returned the large plastic bag containing smaller packages of cocaine to the basement area of the residence, John Doe reported. Based on those facts, complainant Special Agent Howard stated that he believed that Mr. Guarino and Mr. Wilson were in possession of cocaine. Although the complaint recited all of these facts in a first person narrative, the complaint was signed only by Special Agent Howard and not by John Doe.

On the afternoon of May 2, 1995, Agent Howard appeared before Judge Gamberdino in the Cook County Circuit Court. Appearing with Agent Howard was the confidential informant who had supplied the information that formed the basis for the warrant. In the complaint seeking the warrant, in the draft warrant, and in his statements before the judge, Agent Howard referred to the informant as "John Doe" in order to maintain his anonymity. The judge questioned both the informant and the agent under oath, reviewed the complaint for the search warrant and then granted the warrant.

The next day, May 3, Agent Howard, other officers of the Berwyn Police Department, and several agents from the Department of Treasury's Bureau of Alcohol, Tobacco and Firearms ("ATF Agents") executed the warrant and conducted the search of the residence. They seized drugs, a cache of firearms and silencers, and one weapon with

an obliterated serial number. The agents and officers also arrested Mr. Wilson and Mr. Guarino.[1]

Both men were indicted by a federal grand jury. Mr. Guarino was charged in 3 counts with illegal possession of machine guns and firearms (in violation of 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d)) and possession with intent to distribute cocaine (in violation of 21 U.S.C. § 841). Mr. Wilson was charged with 2 counts of illegal possession of firearms, one of which had an obliterated serial number (in violation of 26 U.S.C. § 5861(d)).

B. Decisions of the District Court

Mr. Guarino filed a motion to suppress the evidence resulting from the search of his residence. Mr. Wilson joined in the motion. The defendants challenged the constitutional validity of the search warrant on the ground that the complaint for the warrant did not comply with the oath or affirmation requirements of the constitutions of the United States and of Illinois because John Doe did not sign the complaint and was not proven reliable.

The government, in response to this motion, attached the sworn affidavits of Judge Gamberdino and Special Agent Howard. These documents described the facts and circumstances concerning the proceedings in the Cook

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[1] Agent Howard was assisted in the execution of the search warrant by several ATF Agents. The reports filed by ATF Agents Thomas Murphy, Timothy Wilson and Jeffrey Kosiek and by Special Agent Howard listed in detail the evidence seized in various locations of the residence and reported the statements made by Mr. Guarino and Mr. Wilson.

County Circuit Court that led to the issuance of the search warrant. Judge Gamberdino affied that Agent Howard presented the search warrant and complaint for the warrant to the court on May 2, 1995, and that both the officer and the informant appeared as witnesses. He further stated that he was aware that "John Doe" was a pseudonym used to conceal the informant's identity. The judge reported that, even though he could not remember any specific questions he had asked Agent Howard and John Doe, it was his usual and regular practice when reviewing "John Doe" search warrants to question both the informant and the officer under oath. He explained that he "always ask[ed] these questions in order to assess the reliability and credibility of the informant and/or the officer, and to determine their basis of knowledge for the facts alleged in the affidavit." Wilson R.28, Ex.1. The judge also stated that he approved such warrants only after satisfying himself that the witnesses were "reliable and credible, and that the facts alleged in the affidavit and to me personally are sufficient to establish probable cause to issue the warrant." *Id.*

In his affidavit, Special Agent Howard stated that he presented the search warrant and complaint to the court on May 2. His sworn statement also verified Judge Gamberdino's reported procedure of questioning both Agent Howard and John Doe under oath. Although Agent Howard did not remember the actual questions the judge asked, he did recall that the under-oath questioning concerned the witnesses' reliability and credibility and the basis of their knowledge for the facts alleged in the complaint and search warrant.

On November 19, 1996, the district court denied the defendants' motion to suppress. The court determined first that the complaint for the search warrant was "sloppily drafted and [was], by itself, insufficient to support a finding of probable cause," Mem. Op. at 7, because it was written as a first-person statement of John Doe but was signed by Agent Howard. Moreover, noted the court, the complaint did not state specifically that Doe informed Agent Howard of the facts in the complaint or that Agent Howard found Doe's information to be credible and reliable. Nevertheless, the district court stated, because the judge, prior to signing the warrant, reviewed the complaint and heard the sworn testimony of the two witnesses concerning the facts alleged in the warrant, the "oath or affirmation" requirement was satisfied. The court noted in particular that John Doe, by giving sworn testimony, had "subjected himself to the possibility of prosecution for perjury had his testimony proved false" and, by appearing personally before the court, had enabled the judge to assess Doe's credibility and the reliability of his testimony in the complaint. *Id.* at 6.

The district court then considered Mr. Guarino's claim that Agent Howard had misled Judge Gamberdino by presenting information in the complaint that Agent Howard knew to be false. Mr. Guarino, by affidavit, denied that he had used cocaine with anyone on May 1, 1995, and denied that anyone who could be "John Doe" was in his home on that day. Concluding that Agent Howard fabricated the facts, Mr. Guarino sought a hearing on the issue under *Franks v. Delaware*, 438 U.S. 154

(1978).[2] The district court determined that Mr. Guarino's affidavit was merely a "bare-bones, self-serving denial of the facts set forth by [Agent] Howard" in the complaint for the search warrant. It did not provide the "substantial preliminary showing" needed to justify a *Franks* hearing. *Id.* at 8-9. Therefore, the court concluded, no evidentiary hearing was required.

The district court also denied Mr. Guarino's second motion to quash and suppress.[3] Thereafter, each defendant entered a conditional plea of guilty but reserved the right to appeal the district court's suppression determinations. On November 24, 1997, Mr. Guarino was sentenced to 42 months of imprisonment and Mr. Wilson to 37 months.

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[2] In *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), the Supreme Court held that a defendant may obtain a hearing to challenge a warrant affidavit if he makes a "substantial preliminary showing" that the affiant has intentionally or recklessly included a false statement in the warrant affidavit and that the false statement was necessary to the probable cause determination. The defendant's showing must be substantial in order to overcome the presumption that a search warrant affidavit is valid. *See id.* at 171.

[3] In addition to reaffirming its first ruling on the defendants' suppression motion, the district court ruled that the person named by Mr. Guarino as the "confidential informant" was not the informant. It further determined that Mr. Guarino's "variety of possible entrapment scenarios" does not constitute a "substantial preliminary showing" that a false statement was included by the confidential informant or Agent Howard in the warrant affidavit. The court concluded that an evidentiary hearing was not warranted. *See* Order, Guarino R.49.

II

DISCUSSION

A. Denial of the Suppression Motion

1.

On appeal, the defendants challenge the validity of the search warrant on two grounds. They contend first that the confidential informant's unsigned and unsworn statement in the complaint for the search warrant violated the Oath or Affirmation Clause of the Fourth Amendment. Second, they claim that the informant's reliability was not proven to the court issuing the warrant. Thus, they conclude, the state court erred in relying on the informant's unsworn statement when it found probable cause to issue the warrant. The defendants further contend that, even though the district court correctly recognized that the complaint for the search warrant was insufficient to support a finding of probable cause, it erred in relying on the inadequate affidavits of Judge Gamberdino and Special Agent Howard in satisfaction of the oath or affirmation requirement. According to the defendants, the judge's statement was speculative and ambiguous because he could not remember any questions he asked the two witnesses and because no transcript of the hearing was available. The Special Agent's affidavit was equally insufficient, the defendants contend, because it never vouched for the credibility and reliability of John Doe's evidence and because there was no transcript to prove that the officer appeared before the judge. Finally, the defendants assert that a hearing should be held, with opportunity for full cross-examination, to test the state

court judge's memory and his usual and customary practice of questioning complainants under oath.

2.

In this case, our review focuses on a complaint for the search warrant and particularly on the sworn statement of the complainant seeking the search warrant. Whether the oath or affirmation requirement was met is a question of law that we review de novo. In making this assessment, we keep in mind the words of the Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983), that "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.* at 236 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (internal quotations omitted)). We must recognize that that judge's task "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Lloyd*, 71 F.3d 1256, 1263 (7th Cir. 1995) (quoting *Gates*, 462 U.S. at 238), *cert. denied*, 517 U.S. 1249 (1996).

3.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, governs searches and seizures by state officers. *See Ker v. California*, 374 U.S. 23, 30 (1963). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by *Oath* or *affirmation*, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV (emphasis added). Although the states retain a great deal of flexibility in the manner in which they conform their law enforcement procedures to the standards of the Fourth Amendment,[4] our

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[4] The Supreme Court made it clear in *Ker* that "[t]he States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . ." 374 U.S. at 34 (citation omitted). As the Court explained, "[s]uch a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques." *Id.*

State law can also play an ancillary role in Fourth Amendment reasonableness determinations. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (stating in dictum that, in the context of a search incident to an arrest, "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law"); *see also Colorado v. Bertine*, 479 U.S. 367, 371-73 (1987) (concluding that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure"); *Illinois v. Lafayette*, 462 U.S. 640, 643-47 (1983) (same); *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976) (same); *cf. Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (holding that, among the factors to be considered in

jurisprudence makes clear that federal standards apply to the interpretation of the Fourth Amendment. As Justice Black wrote for the Court in *Cooper v. California*, 386 U.S. 58, 61 (1967), "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." *See United States v. Delaporte*, 42 F.3d 1118, 1119 (7th Cir. 1994) (holding that defendant in federal drug prosecution was not entitled to suppression of evidence based on violation of state law by state police officers); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (holding that, in determining whether there has been an unreasonable search and seizure by state officers, a federal court must only look to federal law); *United States v. Singer*, 943 F.2d 758, 761 (7th Cir. 1991) (holding that evidence seized by local authorities, whether or not in contravention of state law, is admissible in federal criminal proceeding if it was obtained in a manner consistent with protections afforded by the United States Constitution and federal law); *United States v. D'Antoni*, 874 F.2d 1214, 1218 (7th Cir. 1989) (holding that, as long as evidence is admissible under federal law, it is admissible in federal court even if the evidence may not be admissible in state court); *United States v. Mealy*, 851 F.2d 890, 907 (7th Cir. 1988) (holding that, in determining

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assessing the reasonableness of a search or seizure, the common-law knock-and-announce principle "is an element of the reasonableness inquiry under the Fourth Amendment because there is little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search and seizure").

whether evidence seized by state officials may be used against a defendant in a federal proceeding, the district court must determine the legality of the search and seizure as if federal officers had executed the search and seizure).[5]

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[5] Other circuits have held similarly. In *United States v. Wilson*, 36 F.3d 205, 208 (1st Cir. 1994), after reiterating that federal law governs federal prosecutions in federal court, the First Circuit held that evidence admissible under federal law is admissible in federal court proceedings without regard to state law, even when the evidence is obtained in the course of a state investigation. The Second Circuit has held that evidence that is admissible under federal law will not be suppressed during a federal trial on the basis of a violation of a state exclusionary rule. *See United States v. Pforzheimer*, 826 F.2d 200, 204 (2d Cir. 1987). Furthermore, in *United States v. Rickus*, 737 F.2d 360, 363-64 (3d Cir. 1984), the Third Circuit held that evidence obtained in accordance with federal law is admissible in federal court even if the evidence was obtained by state officers in violation of state law. The Fourth Circuit in *United States v. Clutchette*, 24 F.3d 577 (4th Cir. 1994), declined to address the question of interplay between state law and the exclusionary rule. However, the court stated that the prevailing view appears to be that violations of state law alone do not compel exclusion of the evidence in federal courts. *See id.* at 581. The Fifth Circuit in *United States v. Eastland*, 989 F.2d 760, 766 (5th Cir.), *cert. denied*, 510 U.S. 890 (1993), held that when evidence is secured by state officials and is to be used against a defendant in a federal prosecution, admissibility of the evidence is determined by federal law. *Id.* at 765. The Eighth Circuit has similarly held that evidence obtained in violation of state law is admissible in a federal criminal trial if the evidence was obtained without violating the Constitution or federal law. *See United States v. Padilla-Pena*, 129 F.3d 457, 464 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2064 (1998).

We believe that the procedure followed in this case by the state court complies sufficiently with the oath or affirmation requirement of the Fourth Amendment. No doubt, the preferred practice counsels that the issuing judge require that the informants' statements be reduced to writing and verified. Nevertheless, as a practical matter, the procedure employed in this case gave the judicial officer sufficient opportunity to obtain, under oath, enough information from the informant to satisfy the concerns protected by the oath or affirmation requirement.

The court's interview of the informant under oath allowed the judicial officer to assess the reliability of the informant as well as the reliability of his factual information. In this case, the complaint itself established that John Doe appeared before the court to attest to the facts presented in the complaint. Moreover, the judge who issued the warrant affied that John Doe appeared and submitted to the court's questions. Under these circumstances, there was sufficient opportunity for the judge to assess the reliability and credibility of the informant.

Our decision in *United States v. Causey*, 9 F.3d 1341 (7th Cir. 1993), *cert. denied*, 511 U.S. 1024 (1994), provides helpful guidance. In that case, the warrant was issued upon a complaint signed by the officer and by the confidential informant but pseudonymously. Although the identity of the informant was hidden, both the officer and the informant who provided the information upon which the warrant was based appeared before the issuing judicial officer. Emphasizing that the legality of the search must be determined on the basis of the "circumstances as a whole," *id.* at 1344, we upheld the search. We noted that

> both [the officer who signed the warrant complaint] and the confidential informant personally appeared before the issuing judge. The judge's inquiry of the informant permitted him to assess the informant's credibility and allay any concerns he might have had about the veracity of the informant's statements.

Id. (citation omitted); *see also United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995) (recognizing that, when an informant "is available to give testimony before the judge issuing the warrant, his presence adds to the reliability of the information used to obtain the warrant"), *cert. denied*, 517 U.S. 1249 (1996). We agree with the district court that the issuing judicial officer's questioning of both Agent Howard and John Doe under oath prior to signing the search warrant was sufficient to satisfy the constitutional "oath or affirmation" requirement. The informant's appearance in court and his testimony under oath subjected the informant to the possibility of prosecution for perjury, had his testimony proved false, and enabled the judge to assess John Doe's credibility and reliability.

4.

Finally, we cannot accept the contention that the evidence before the district court did not justify the denial of the motion to suppress. Mr. Guarino contends that we cannot be sure John Doe appeared before the issuing judge because there is no transcript of the proceeding and because the issuing judge, in his affidavit, stated that he could not remember the questions he asked Doe. Judge Gamberdino, however, submitted an affidavit stating that

he considered "the under oath statements of both individuals who appeared before" him before signing and dating the warrant. Guarino R.28, Ex.1. He further described his usual and regular practice when reviewing John Doe search warrants. His standard practice was to question the officer and the informant "in order to assess the reliability and credibility of the informant and/or the officer, and to determine their basis of knowledge for the facts alleged in the affidavit." *Id.* He stated as well that he signed the warrant only after satisfying himself that the witnesses were reliable and credible and the facts alleged were sufficient to establish probable cause. Special Agent Howard, in his affidavit, also recalled that the judge's questions concerned the informant's reliability and credibility and the basis of his knowledge of the facts alleged.

When there is a judicial proceeding that is under scrutiny, as is the warrant hearing in this case, and there is no transcript of the proceeding, it is not uncommon for a reviewing court to rely on evidence of the regular custom or practice of judicial officers (or of other witnesses) to determine the sufficiency of court procedures or the court's compliance with constitutional standards. *Cf. United States v. Dickerson*, 901 F.2d 579, 583 (7th Cir. 1990) (investigating the custom, practice and law applicable to Illinois guilty pleas and, to the extent possible, the particular court's practice to determine whether the plea was an intelligent and voluntary waiver of the defendant's rights). We recognize a strong presumption of regularity in state judicial proceedings. *See United States v. Hoggard*, 61 F.3d 540, 543 (7th Cir. 1995) (per curiam) (approving the acceptance of a state trial judge's affidavit concerning his practice of advising defendants at their

initial appearance or arraignment). Thus, when there is no record of the state proceeding in question, a "court may accept testimony establishing the 'custom and practice' of the trial court in following proper procedures." *Id.* (citing cases).

The district court did not err in receiving the affidavits of the complainant and of the state trial judge who issued the warrant being challenged. Nor did it err in concluding, on the basis of those affidavits, that the witnesses Agent Howard and John Doe had been sworn and questioned in this particular case. Because Mr. Guarino did not establish that Judge Gamberdino would give testimony under oath different from, and contrary to, his sworn statements in his affidavit, the district court properly concluded that a hearing on Judge Gamberdino's probable cause hearing would be unnecessary and inefficient. *See* Guarino R.32 at 7 n.4.

Before this court, Mr. Guarino now suggests for the first time that Judge Gamberdino and Agent Howard ought to have been required to testify at a suppression hearing. Mr. Guarino seeks to question the state judge's and special agent's veracity and memory concerning the procedure employed in applying for the warrant as described in their affidavits. As a threshold matter, we note that arguments raised before this court for the first time are reviewed only for plain error. *See Hoggard*, 61 F.3d at 543. More fundamentally, Mr. Guarino offers no evidence to refute the affidavits. Those affidavits were submitted to the court as evidence of the state court's regular custom or practice when reviewing a complaint for a search warrant; the district court appropriately accepted them for that purpose. Because Mr. Guarino

failed to challenge any of the underlying facts or to raise any significant disputed factual issue, the district court did not need to hold a fact-finding hearing. *See United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir.) (requiring an evidentiary hearing "only if the party requesting the hearing raises a significant, disputed factual issue"), *cert. denied*, 498 U.S. 843 (1990).

In sum, we hold that the district court did not err in denying the defendants' motion to suppress evidence seized in the search of their persons and residence.

B. Mr. Guarino's Sentencing Challenge

After Mr. Guarino entered a plea of guilty, at sentencing he was given a 3-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. Mr. Guarino now asserts that receiving that reduction required him to forgo any challenge concerning the upward adjustment given for the drugs found in his home. He claims that he had maintained consistently that he had no involvement in drugs in relation to this case, that the cocaine in his house belonged to someone else, and that his admission of guilt was on the gun charge. Nevertheless, he admits, as he must, that he pled guilty to count 3, possession with intent to distribute cocaine, and that he chose not to go to trial on that drug charge in the face of the overwhelming evidence against him on the gun charge.

At sentencing, the government argued that the § 3E1.1 reduction ought not be granted. It claimed that Mr. Guarino had made two false denials: (1) He denied that he had reason to believe that the firearms in his

residence would be used in connection with another felony offense, such as narcotics trafficking, and (2) he denied knowledge of the cocaine found in his residence that was the basis for count 3. The district court stated to Mr. Guarino that, in deciding whether he had accepted responsibility, it would consider whether he truthfully had admitted the conduct comprising the offenses; it explained that his contesting his possession of cocaine was a denial of that conduct. At that point, Mr. Guarino stated that he would waive his objection. The district court then determined that it would give him the 3-point credit, even though he previously had denied knowledge of the cocaine.

A district court's § 3E1.1 determination "is one of fact that depends primarily upon credibility assessments and is reviewed for clear error." *United States v. Whitson*, 125 F.3d 1071, 1075 (7th Cir. 1997). The guideline's first application note states that the sentencing court determines whether a defendant qualifies for acceptance of responsibility by considering such factors as whether he is "truthfully admitting the conduct comprising the offense(s) of conviction." U.S.S.G. § 3E1.1, comment. (n.1(a)) ("[A] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."). A defendant usually does not qualify if he "puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* comment. (n.2). However, a defendant still may claim the benefit of the acceptance of responsibility

reduction, even if he goes to trial, by admitting the factual elements of guilt but challenging the constitutionality of a statute. *Id.*

In this case, at sentencing Mr. Guarino initially denied, rather than admitted, the factual allegations concerning his involvement in drugs. Even though he had pleaded guilty to the count of possession of cocaine with intent to distribute it, he argued that the cocaine was not his. At that point in the proceedings, the district court was confronted with a situation that had some similarities to the situation in *United States v. Rector,* 111 F.3d 503 (7th Cir. 1997), in which the defendant's defense was, in effect, "I did it but it was somebody else's fault that I did it." *Id.* at 508. In that case, the defendant admitted the essential elements of guilt from the beginning but proceeded to trial to assert an entrapment defense that did not require him to deny the factual allegations. We upheld the district court's refusal to grant him a downward adjustment for acceptance of responsibility, both because the defendant demonstrated no remorse and because an entrapment defense "by its nature tends to preclude the acceptance of responsibility." *Id.* at 508.

In our case, Mr. Guarino did not proceed to trial; nevertheless, at sentencing, even while adhering to his plea of guilty, he wanted to deny the essential factual elements of guilt for cocaine possession. When the sentencing court reminded him that a defendant must demonstrate clearly a recognition and affirmative acceptance of personal responsibility for all his criminal conduct, as § 3E1.1(a) requires, Mr. Guarino chose to waive his objections. Mr. Guarino made a conscious decision to forgo his challenge to the factual allegations concerning his

involvement in drugs and opted instead for the 3-point reduction. It is clear from the record that the sentencing court did not preclude Mr. Guarino from making a different choice.[6]

C. Mr. Wilson's Sentencing Challenge

Mr. Wilson claims that the court erred in sentencing him at an adjusted offense level of 20.[7] The mistake occurred when the court increased the base offense level by 3 points rather than 2 points for the number of firearms involved. The offense involved 7 firearms and, under § 2K2.1(b)(1)(B), that number of weapons deserves an increase of 2, not 3, levels. Neither the government nor defense counsel noticed the error at the time of sentencing.

The government agrees with Mr. Wilson's position and urges a remand. It notes that, although the actual sentence imposed by the district court, 37 months, is within the guideline range for level 19 (30-37 months), it is at the top of that range. According to the government, because the district court had determined to sentence Mr.

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[6] The government has not challenged the award of the § 3E1.1 reduction.

[7] The pertinent sentencing guideline applicable to firearms offenses is U.S.S.G. § 2K2.1. The court determined a base offense level of 18 (§ 2K2.1(a)(5)). It then increased the level by 3 levels because there were 7 firearms (§ 2K2.1(b)(1)(B)) and by 2 levels because one weapon had an obliterated serial number (§ 2K2.1(b)(4)). It then gave Mr. Wilson a downward adjustment of 3 levels for his acceptance of responsibility (§ 3E1.1). As a result, the adjusted offense level was 20. The element being challenged is the 3-level increase because there were 7 firearms.

Wilson in the mid-range, the case should be remanded to that court so that it can decide in the first instance whether it should choose again to resentence Mr. Wilson in the middle range of level 19 or at another sentence that it determines, in its discretion, is proper.

Notwithstanding the government's agreement with Mr. Wilson, we must evaluate independently Mr. Wilson's claim. *See Griffin v. United States*, 109 F.3d 1217, 1219 (7th Cir. 1997); *United States v. Locklear*, 97 F.3d 196, 198 (7th Cir. 1996).[8] "Confessions of error by the [government] are, of course, entitled to and given great weight, but they do not 'relieve this Court of the performance of the judicial function.' " *Sibron v. New York*, 392 U.S. 40, 58 (1968) (quoting *Young v. United States*, 315 U.S. 257, 258 (1942)).[9] Our review of the sentencing documents and the

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[8] Other circuits also hold that the government's change of position or confession of error is not binding on a court of appeals and does not relieve an appellate court of its responsibility to review the asserted error. *See United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996); *United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996); *United States v. Stern*, 13 F.3d 489, 496-97 (1st Cir. 1994); *United States v. Kepner*, 843 F.2d 755, 763 n.6 (3d Cir. 1988); *Every v. Blackburn*, 781 F.2d 1138, 1140-41 (5th Cir. 1986); *United States v. Brainer*, 691 F.2d 691, 693 (4th Cir. 1982); *United States v. Gaskins*, 485 F.2d 1046, 1047 (D.C. Cir. 1973) (per curiam); *cf. United States v. Bell*, 991 F.2d 1445, 1448 (8th Cir. 1993) (stating that, "[i]f a case is to be disposed of based solely upon a confession of error, the court should clearly indicate that it is not announcing a rule of law").

[9] In *United States v. Rector*, 111 F.3d 503, 508 (7th Cir. 1997), a panel of this court remanded a sentencing matter to the district court with directions to resentence according to the confession of error of the government. The panel indicated that it could not decide whether the confession of error was provident because

guidelines confirms that an error, perhaps a ministerial one but one of clear consequence, was made. We therefore remand Mr. Wilson's case to the district court for resentencing.

Conclusion

For the foregoing reasons, we reverse and remand Mr. Wilson's sentence to the district court for resentencing, and affirm the judgment of the district court as to all other issues raised in this appeal.

AFFIRMED in part,
REVERSED and REMANDED in part

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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the government's concession removed the "case or controversy" from the sentencing issue. The panel did not purport to overrule our earlier decisions, *see* Circuit Rule 40(e), nor did it indicate why *Sibron* was no longer controlling precedent. We agree with the Fourth Circuit's ruling in *Brainer*, 691 F.2d at 693, that "the government's subsequent change of position neither mooted the case nor otherwise transformed it into something less than a case or controversy." Because we overrule *Rector* insofar as it holds that the government's confession of error moots the issue, we have circulated this case to the entire court as required by Circuit Rule 40(e). No judge favored a rehearing en banc on this issue.

B1

UNITED STATES of America,

v.

Joseph GUARINO and Jeremy Wilson.
No. 96 CR 371.
United States District Court,
N.D. Illinois, Eastern Division.
Nov. 20, 1996.

MEMORANDUM OPINION AND ORDER

MAROVICH, District Judge.

On May 2, 1995, Cook County Circuit Court Judge Nello P. Gamberdino issued a search warrant for the persons of Defendants Joseph Guarino ("Guarino") and Jeremy Wilson ("Wilson") and for the residence at 2335 S. Euclid in Berwyn, Illinois based upon an affidavit signed by Ken Howard ("Howard") of the Berwyn Police Department containing the statements of "John Doe," a confidential informant. Pursuant to the warrant, a search was executed by Howard and other officers on May 3, 1995, and a variety of items (including guns and drugs) were seized. Some of the seized items form the basis of the government's present charges. Guarino was arrested at the time of the search, and the government has disclosed incriminating statements made by Guarino at the time of his arrest.

Now before the Court is Guarino's motion to suppress any and all evidence that is the direct or indirect product of the May 3, 1995 search of Guarino's home, including all items seized by law enforcement personnel and all statements made by Guarino during the course of his arrest. Specifically, Guarino maintains that (1) Judge

Gamberdino could not reasonably have found the existence of probable cause sufficient to justify issuance of the search warrant, as the complaint principally contained the first-person statement of Doe, who did not sign the complaint and whose reliability was not adequately established; and (2) the warrant was invalid, as it contained misleading information that the affiant, Howard, either knew to be false or would have known to be false absent his reckless disregard for the truth. For the reasons set forth below, the Court rejects Guarino's challenges to the legality of the May 3, 1995 search and, accordingly, denies Guarino's motion to suppress.[1]

A. Judge Gamberdino Properly Found The Existence Of Probable Cause, Supported By Oath Or Affirmation

The fourth amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched. . . . " (U.S. Const., amend. IV.) Similarly, section 6 of article I of the 1970 Illinois Constitution provides that "[n]o warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the

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[1] Wilson joins in Guarino's motion to suppress and, in support of the motion, filed a separate memorandum of law. As Wilson does not suggest the facts and/or legal authorities/doctrines relevant to his petition for suppression differ in any way from those relevant to Guarino's petition, the Court denies Wilson's motion for the same reasons it denies Guarino's motion.

persons or things to be seized." (Ill. Const. 1970, art. I, sec. 6.)

Illinois and Seventh Circuit courts uniformly have held that the "oath or affirmation" requirement of the U.S. and Illinois Constitutions is satisfied by the issuance of a search warrant based upon information supplied by a confidential informant so long as (1) the confidential informant, using a fictitious name (or alias), personally signs a complaint, such that if the allegations contained in the complaint prove false he may be charged with perjury; and/or (2) the officer or agent signs a complaint setting forth, at a minimum, the hearsay testimony of the informant, some of the circumstances giving rise to the informant's knowledge, and some of the circumstances from which the officer concluded that the informant's testimony was credible or his information reliable. *See United States v. Causey*, 9 F.3d 1341, 1342-43 (7th Cir. 1993); *People v. Gates*, 423 N.E.2d 887, 890 (Ill. 1981); *People v. O'Neal*, 352 N.E.2d 282, 284 (Ill. App. 1976); *People v. Stansberry*, 268 N.E.2d 431, 433 (Ill. 1971); *People v. Bak*, 258 N.E.2d 341 (Ill. 1970). In the present case, neither of these conditions is satisfied.

As correctly pointed out by Guarino, the complaint for search warrant is written as the first-person statement of John Doe; yet, the complaint is signed not by Doe, but by Howard. Further, even though it is signed by Howard, the complaint does not specifically state that Howard was informed by Doe of the facts contained in the complaint; does not set forth that Howard, in fact, believed the statements of Doe to be true; and does not detail the circumstances giving rise to Howard's belief (if it existed)

that Doe's statements were credible and/or his information reliable. In this manner, the present complaint is remarkably similar to that at issue in *People v. Dinger*, 435 N.E.2d 1348 (Ill. App. 1982).

In *Dinger*, the court was faced with a complaint for search warrant that listed the complainant as both Dave Crouch and an informant, John Doe. The first sentence of the probable cause statement incorporated into the complaint recited, "Complainant John Doe (Assumed Name) states that during the period from October 11, 1980 through December 22, 1980, I have had numerous occasions to be in the house of [Defendant] Joe A. Dinger,. . . . " This statement notwithstanding, the complaint was signed only by Crouch, not by Doe. Finding that the complaint failed to satisfy the constitutional "oath or affirmation" requirement, the *Dinger* court affirmed the order of the trial court suppressing the evidence recovered from the search. The court stated:

> The probable cause statement, while thus purporting to be made by the complainant John Doe, was not sworn to by him, and David Crouch, the sworn complainant, did not indicate in the affidavit that the information contained in the first paragraph was given to him by Doe. The unsworn statements purport to be those of John Doe only.
>
> * * *
>
> The necessity of a sworn statement, or one made under oath, is not a minor defect which does not prejudice the rights of the accused. At the suppression hearing, much of the testimony of defendant's witnesses contradicted Doe's statements that he has had numerous occasions to be

> in the defendant's house lawfully, but even had the defendant been able to meet the standards set out in [*Franks v. Delaware*, 438 U.S. 154 (1978)], there would be no basis upon which to charge the alias complainant with perjury.
>
> *Dinger*, 435 N.E.2d at 1350-51.

Given the obvious similarities between the deficient complaint in *Dinger* and the complaint in the present case, were there nothing more than the affidavit signed by Howard to support Judge Gamberdino's finding of probable cause and issuance of the search warrant, *Dinger* seemingly would compel the conclusions that the May 3, 1995 search of Guarino's home was constitutionally infirm and that the evidence and statements obtained by the government as a result of the search should be suppressed. Yet, significantly, both Judge Gamberdino and Howard state in affidavits submitted along with the Government's brief in opposition to Guarino's motion to suppress that, in addition to reviewing the apparently deficient complaint for search warrant signed by Howard, Judge Gamberdino questioned both Howard and Doe under oath prior to signing the search warrant on May 2, 1995.[2]

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[2] Although Guarino maintains that the Government may not offer evidence of matters outside the "four corners" of the complaint for search warrant – evidence such as Howard's and Doe's testimony and/or the affidavits of Judge Gamberdino and Howard –, Illinois law makes clear both that (1) the issuing judge may rely on evidence other than the contents of the complaint in determining an informant's reliability, *City of Chicago v. Adams*, 267 N.E.2d 1299, 1301 (Ill. 1977), and (2) a reviewing court may consider all evidence presented to the issuing judge in assessing the constitutionality/propriety of the

Doe's giving of sworn testimony as to the matters set forth in the complaint for search warrant was, and is, sufficient to satisfy the constitutional "oath and affirmation" requirement, as Doe, by testifying under oath, subjected himself to the possibility of prosecution for perjury had his testimony proved false. Moreover, by appearing personally in court, Doe enabled the Judge to assess accurately (or, at least, presumptively so) Doe's credibility and to verify sufficiently the reliability of Doe's hearsay testimony in the complaint. *See City of Chicago v. Adams*, 367 N.E.2d 1299, 1301 (Ill. 1977) ("Although good practice would suggest that the issuing judge cause the informant's statement to be reduced to writing and verified, we conclude that this record shows a sufficient basis to support both the credibility of the hearsay information and the determination of probable cause."); *People v. Phillips*, 637 N.E.2d 715, 721 (Ill. App. 1994) (finding search warrant valid where "the informant appeared before the judge . . . and the judge was able to assess the credibility of the informant."); *People v. Evans*, 373 N.E.2d 524, 528 (Ill. App. 1978) (concluding that informant's presence in court "obviously gave the issuing judge a sufficient basis for judging the informant's credibility."). Indeed, even the *Dinger* court suggested that had the issuing judge in that case assessed the reliability of the informant and his information by hearing the informant's

---

issuance of a search warrant, *People v. Daehler*, 373 N.E.2d 776, 776-77 (Ill. App. 1978). Yet, even if the Court were not to consider the affidavits of Gamberdino and/or Howard for purposes of resolving the present motion, the complaint for search warrant itself verifies that Doe appeared personally before Judge Gamberdino.

sworn testimony the judge properly could have found the existence of probable cause, the defects of the written complaint notwithstanding:

> We note also that there is no evidence in the record that the issuing judge inquired of Doe, under oath, as to the truth of the matters contained in Doe's probable cause statement. We thus conclude that Doe's purported statement should have played no part in the court's probable cause determination.
>
> *Dinger*, 435 N.E.2d at 1351.[3]

In sum, while the written complaint for search warrant signed by Howard is sloppily drafted and is, by itself, insufficient to support a finding of probable cause, this Court concludes that Doe's and Howard's giving of testimony under oath to Judge Gamberdino as to the facts and circumstances supporting the issuance of a warrant satisfied (if only just barely) the "oath and affirmation" requirement of the U.S. and Illinois constitutions and established a sufficient basis to support both the credibility of Doe's hearsay testimony and the propriety of Judge Gamberdino's probable cause determination.[4]

---

[3] Guarino does not contend that the facts set forth in the complaint for search warrant, if true, are insufficient to establish probable cause for the issuance of the warrant. Rather, Guarino asserts that (1) the complaint lacked sufficient indicia of reliability to permit Judge Gamberdino to rely upon the facts contained therein in making his probable cause determination; and (2) the facts asserted by Doe were not, and could not have been, true.

[4] Unless Guarino suggests that Judge Gamberdino would give testimony under oath different from, and contrary to, his

B. Guarino Has Not Presented Sufficient Evidence Of Falsity To Justify An Evidentiary Hearing On The Validity Of The Complaint

Guarino next contends that Judge Gamberdino was "misled" by information contained in the complaint signed by Howard that Howard knew to be false (or would have known to be false but for his reckless disregard for the truth). Specifically, by way of affidavit testimony, Guarino denies that anyone who could be John Doe was in his home on May 1, 1995, that Guarino snorted cocaine with anyone on that date, and/or that Guarino told anyone that he received a large amount of cocaine on that date. Guarino thus concludes that the facts set forth in the complaint for search warrant are untrue and that Howard "composed" these facts himself.

Affidavits supporting a warrant are presumed valid. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *United States v. McAllister*, 18 F.3d 1412, 1416 (7th Cir. 1994).[5] A defendant may challenge the veracity of a warrant affidavit and establish the need for an evidentiary hearing (often referred to as a *Franks* hearing) "if he makes a 'substantial preliminary showing' that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *McAllister*, 18 F.3d at 1416 (quoting

---

sworn statements in his affidavit, this Court views a hearing on Guarino's present motion as unnecessary and inefficient.

[5] In Illinois, the presumption of veracity applies to both governmental and nongovernmental affiants. *People v. McCoy*, 482 N.E.2d 200, 205 (Ill. App. 1985).

Franks, 438 U.S. at 155). To require an evidentiary hearing, however, a defendant's attack "must be more than conclusory and must be supported by more than a mere desire to cross-examine [the affiant]." *Id.* Self-serving statements by a defendant are insufficient, by themselves, to mandate a *Franks* hearing. *United States v. Pace*, 898 F.2d 1218, 1227 (7th Cir. 1990); *People v. Birge*, 485 N.E.2d 37, 42-43 (Ill. App. 1985); *People v. Rodriguez*, 456 N.E.2d 989, 992 (Ill. App. 1983); *People v. Anderson*, 392 N.E.2d 715, 720 (Ill. App. 1994).

Here, the only evidence presented by Guarino in support of his contention that Howard knowingly and intentionally included false information in the complaint for search warrant is Guarino's own affidavit. Guarino's bare-bones, self-serving denial of the facts set forth by Howard does not constitute the sort of "substantial preliminary showing" that is required to justify a *Franks* hearing. *See, e.g., People v. Verdone*, 479 N.E.2d 925, 927 (Ill. 1985); *People v. Born*, 447 N.E.2d 426, 431 (Ill. App. 1983).[6]

---

[6] Significantly, Guarino's affidavit does not preclude the possibility that John Doe's testimony is accurate; Guarino merely states that "to the best of [his] knowledge" no one who could be Doe was in his home using cocaine on May 1, 1995. Because the Court finds that the search warrant properly was approved by Judge Gamberdino, the Court needs not, and does not, consider the Government's arguments with respect to Howard's and the other searching officers' "good faith" reliance on Judge Gamberdino's probable cause determination.

CONCLUSION

For the foregoing reasons, the Court denies Guarino's and Wilson's motions to suppress.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day I, John Doe, and S/A Ken Howard #25, MEGCC, Complainant and ATF Agents has subscribed and sworn to a complaint for search warrant before me. Upon examinatien of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search JOSEPH R. GUARINO, Male/White, DOB 04-01-68, 5'06", 190 lbs, Brown/Brown, and TODD WILSON, Male/White, DOB 07-04-70, 5'07", 150 lbs, Black/Brown, and the residence located at 2335 S. Euclid Berwyn, Il. County of Cook.

(PREMISES CITY AND STATE)

and seize the following instruments, guns, articles, safe(s), saftey [sic] deposit box(s), and things: Cocaine

(INSTRUMENTS, ARTICLES AND THINGS)

and any and all instruments, articles, and things used in the manufacture, distribution, and possession of controlled substance known as Cocaine, and articles that extablish [sic] proof of residency and pre-recorded United States Currency and any and all monies associated with profits gained from the sale of narcotics, and dangerous drugs and any commingled [sic] funds, which have been

used in the commission of or which constitutes evidence of the offense of Possession of a Controlled Substance.

I further commend that a return of anything so seized shall be made without necessary delay before me or before Judge _____, or before any court of competent jurisdiction.

/s/ Nello Gamberdino
JUDGE

Time and date of issuance 3:00pm 5-2-95

_____ _____
(Court Branch) (Court date)

_____

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(3-81) CC MC-1-219 (1)

==========

THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

Page 1 of 2 pages

COMPLAINT FOR SEARCH WARRANT

I, Joe Doe, and S/A K. Howard, of MEGCC, Complainant, and being assisted by ATF Agents, (ALCOHOL, TABACCO, [sic] and FIRARMS [sic]) now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to

search the person of GUARINO, JOSEPH R. Male/ White, DOB 04-01-68, 5'06", 190 lbs., Brown/Brown, and the person of TODD WILSON, DOB 07-04-70, 5'07", 150 lbs., Black/Brown, and the residence located at 2335 S. Euclid Berwyn, Il. County of Cook.

(Premises, City and State)

and seize the following instruments, articles, and things: Cocaine and any and all instruments, articles, guns, safes, safety deposit box(s) and things used in the manufacture, distribution and possession of a controlled substance known as Cocaine and articles which establishes proof of residency and pre-recorded United States Currency and any and all monies associated with profits gained from the sale of narcotics and any commingled [sic] funds, which have been used in the commission of or which constitute evidence of the offense of Possession of Controlled Substance.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and premises set forth above:

I, John Doe, have known both GUARINO, JOSEPH R. and TODD WILSON, for a period of time in excess of 12 months, and during that time, I have known both to be in the business of selling COCAINE, I myself have been a regular COCAINE user for 2 years and have snorted COCAINE on occasions with GUARINO and WILSON in the past 12 months. Within in [sic] the past twenty-four hours, on 01 May 95, I John Doe, have had occasion to be at GUARINO and WILSON'S residence located at 2335 S.

Euclid Berwyn, Il, County of Cook at which time GUARINO and WILSON related to me (John Doe) that they had just received a large amount of COCAINE. GUARINO, then told John Doe and WILSON to wait in the kitchen. GUARINO then went into the basement and returned a few moments later to the kitchen carrying a large clear plastic bag that contained smaller packages of white powder (COCAINE). I know the white powder to be COCAINE, due to the fact that GUARINO, WILSON and I snorted some of it.

/s/ s/a K. Howard 9991/25
COMPLAINANT

Subscribed and sworn to before me on 5-2-1995

3:20pm

/s/ Nello Gamberdino
JUDGE

_____ _____

(Court Branch) (Court date)

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

(3-81) CC MC-1-219 (1)

==========

THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

COMPLAINT FOR SEARCH WARRANT-CONTINUED

(PAGE 2 OF 2 PAGES)

I, have been using COCAINE for approximately 2 years and I received the same feeling from snorting the white powder given to me by GUARINO AND WILSON, as I have from snorting COCAINE in the past. GUARINO then replaced the smaller packages into the large clear plastic bag and returned to the basement area of the residence located at 2335 S. Euclid Berwyn, Il. County of Cook, with the large clear plastic bag.

Based on the aforementioned facts, I, John Doe, and S/A K. Howard, MEGCC, and ATF Agents (ALCOHOL, TABACCO [sic] and FIREARMS) believe that JOSEPH R. GUARINO AND TODD WILSON, of 2335 S. Euclid Berwyn, Il. County of Cook, is in possession of a Controlled Substance in violation of the Illinois Revised Statutes.

/s/ s/a K. Howard 9991/25
COMPLAINANT

Subscribed and sworn to before me on 5-2-1995
3:20pm

/s/ Nello Gamberdino
JUDGE

EXHIBIT B

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT

I, the Honorable Nello P. Gamberdino, Associate Judge of the Circuit Court of Cook County, being duly sworn under oath, state as follows:

1. I am an Associate Judge of the Circuit Court of Cook County, assigned to the Maywood Courthouse, which is located at 1500 Maybrook Drive in Maywood, Illinois.

2. On May 2, 1995, I reviewed the "John Doe (search warrant attached to this affidavit as Exhibit A, which affidavit was presented to me by Officer Ken Howard of the Berwyn Police Department. Officer Howard was accompanied by the informant, identified to me as "John Doe." Although I was not aware of the informant's true identity, I was aware that "John Doe" was a pseudonym being used to hide his actual identity. After reviewing the complaint for search warrant and considering the under oath statements of both individuals who appeared before me, I signed and dated the warrant at the bottom of each page.

3. I have no specific recollection of the questions I asked either Officer Howard or "John Doe" on May 2, 1995, nor do I recall the answers they provided to my questions. However, in reviewing "John Doe" search warrants, it is my usual and regular practice to question both

the officer and the informant who appear before me under oath. I always ask these questions in order to assess the reliability and credibility of the informant and/or the officer, and to determine their basis of knowledge for the facts alleged in the affidavit. When I am satisfied that "John Doe" and/or the officer is reliable and credible, and that the facts alleged in the affidavit and to me personally are sufficient to establish probable cause to issue the search warrant, I sign and approve the warrant.

FURTHER AFFIANT SAYETH NOT.

/s/ Nello P. Gamberdino
NELLO P. GAMBERDINO
Associate Judge,
Circuit Court of Cook County

Subscribed and sworn before me
this 21st day of October, 1996

/s/ Kathy Massie
NOTARY PUBLIC

OFFICIAL SEAL
KATHY MASSIE
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 10, 1997

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT

I, Special Agent Ken Howard, being duly sworn under oath, state as follows:

1. I am a police officer with the Berwyn Police Department, presently assigned to the Drug Enforcement Administration Task Force. In May of 1995, I was assigned to the Metropolitan Enforcement Group of Cook County ("MEGCC").

2. On May 2, 1995, I prepared a "John Doe" search warrant and complaint for search warrant for the premises at 2335 S. Euclid in Berwyn, Illinois. That afternoon, I appeared before the Honorable Nello P. Gambedino, [sic] Associate Judge, Circuit Court of Cook County, along with the confidential informant who supplied the information that forms the basis for the warrant. In the search warrant and before the judge, I referred to the informant as "John Doe," and to the best of my knowledge, Judge Gamberdino was aware that "John Doe" was a pseudonym being used to hide his actual identity.

3. Judge Gamberdino questioned both the informant and I under oath. Although I have no specific recollection of the precise questions asked by the Judge or the answers given by the informant or by myself, I do recall that they concerned the reliability and credibility of the

informant and his basis of knowledge for the facts alleged in the search warrant and complaint for search warrant.

FURTHER AFFIANT SAYETH NOT.

/s/ S/A Ken Howard
SPECIAL AGENT
KEN HOWARD

Subscribed and sworn before me
this 21st day of October, 1996

/s/ Karen Lynn Sima
NOTARY PUBLIC

"OFFICIAL SEAL"
Karen Lynn Sima
Notary Public State of Illinois
My Commission Expires 2/11/97

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 17, 1999.

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 97-4082 v. JOSEPH GUARINO, Defendant-Appellant.	]]]]]]]]]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 96 CR 371-1 George Marovich, Judge.

ORDER

On consideration of the appellant's petition for rehearing filed on March 3, 1999, the judges on the panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

(2)

No. 98-2016

In the Supreme Court of the United States

JOSEPH GUARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1138

QUESTIONS PRESENTED

1. Whether a court reviewing the constitutionality of a search warrant may look to evidence other than the affidavit accompanying the warrant application and a contemporaneous record of the warrant hearing to determine whether the warrant was issued on probable cause.

2. Whether, on the facts of this case, petitioner was entitled to an evidentiary hearing to challenge affidavits presented to establish that the search warrant in question was issued on probable cause.

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In the Supreme Court of the United States

No. 98-2016

JOSEPH GUARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 169 F.3d 418. The opinion of the district court (Pet. App. B1-B10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1999. A petition for rehearing was denied on March 17, 1999 (Pet. App. D1). The petition for a writ of certiorari was filed on June 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Northern District

of Illinois to one count each of illegal possession of machine guns, in violation of 18 U.S.C. 922(*o*), possession of an unregistered firearm, in violation of 26 U.S.C. 5861, and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841. He was sentenced to 42 months' imprisonment. The court of appeals affirmed. Pet. App. A4-A7.

1. On May 2, 1995, Judge Nello Gamberdino of Cook County, Illinois, issued a search warrant for petitioner's residence. Pet. App. C1. The warrant was based on a complaint that relayed, in first person narrative, the observations of a confidential informant referred to as "John Doe." The informant indicated that he had purchased cocaine from petitioner on repeated occasions and represented that, while in petitioner's residence one day earlier, he was told that petitioner had just received a large shipment of cocaine; the informant also reported that he saw petitioner bring up from the basement a clear plastic bag filled with many smaller packages of cocaine. *Id.* at A2-A3, C3-C4. The complaint, however, was not signed by the confidential informant; instead, it was signed by the officer who requested the warrant, Ken Howard. *Id.* at A3, C4. When county police officers executed the warrant on May 3, 1995, they seized numerous items, including the guns and drugs that formed the basis of the federal indictment against petitioner. *Id.* at A3-A4.

Petitioner moved to suppress all evidence seized pursuant to the warrant, claiming that the warrant had been issued in violation of the Fourth Amendment. Petitioner argued that because John Doe did not sign the complaint himself, there was no evidence that Doe had been placed under oath as required by the Oath or

Affirmation Clause of the Fourth Amendment.[1] Petitioner also argued that the complaint was constitutionally defective because it contained no information establishing Doe's reliability as an informant.

In response, the government presented affidavits from Judge Gamberdino (Pet. App. C6-C7) and Officer Howard (*id.* at C8-C9). Judge Gamberdino stated in his affidavit that both Officer Howard and John Doe (whom the Judge understood to be appearing under a pseudonym), had appeared personally before him on May 2, 1995, for the warrant hearing. The Judge also stated that he issued the warrant only "[a]fter reviewing the complaint * * * and considering the under oath statements of both individuals." *Id.* at C6. Moreover, although he could not recall his particular questions on May 2, the Judge stated that it was his "usual and regular practice to question both the officer and the informant" regarding reliability and credibility. *Id.* at C6-C7. See also *id.* at A5.

Officer Howard stated in his affidavit that he and John Doe had both appeared personally before Judge Gamberdino, and that the Judge had questioned them both about the complaint under oath. Officer Howard also stated that, although he did not recall the specific

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[1] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV (emphasis added). The Clause requires that a person giving information to support a finding of probable cause "manifest a recognition of his duty to speak the truth." *United States* v. *Richardson*, 943 F.2d 547, 549 (5th Cir. 1991).

questions Judge Gamberdino had asked, he did recall "that they concerned the reliability and credibility of the informant and his basis of knowledge for the facts alleged in the * * * complaint for search warrant." Pet. App. C8-C9. See also *id.* at A5.

Based on those affidavits, the District Court for the Northern District of Illinois denied petitioner's motion to suppress. Pet. App. B2. The court stated that, without more, the warrant on its face might violate the Fourth Amendment. *Id.* at B5. However, the court concluded that the affidavits established both that the Oath or Affirmation Clause was satisfied (by John Doe's sworn testimony concerning the complaint before Judge Gamberdino), and that the credibility and reliability requirement was presumptively satisfied (by Judge Gamberdino's questioning of Doe and Howard in court). Thus, Judge Gamberdino did not err in issuing the warrant. *Id.* at B5-B7.

Following the district court's decision, petitioner pleaded guilty to several of the charges in the indictment against him. He reserved the right to appeal the denial of his pretrial motion to suppress. Pet. App. A7.

2. On appeal, petitioner challenged the denial of his pretrial motion to suppress, and claimed for the first time that he was entitled to an evidentiary hearing to challenge the affidavits the government had submitted. Pet. App. A8.

The court of appeals affirmed. Pet. App. A1-A22. Although the court opined that "the preferred practice counsels that the issuing judge require that informants' statements be reduced to writing," the court also concluded that the "procedure employed in this case gave the judicial officer sufficient opportunity to obtain, under oath, enough information from the informant to satisfy the concerns protected by the oath or affirma-

tion requirement." *Id.* at A13. In particular, the court explained, "the issuing judicial officer's questioning of both Officer Howard and John Doe under oath prior to signing the search warrant was sufficient to satisfy the constitutional 'oath or affirmation' requirement," because Doe had been "subjected * * * to the possibility of prosecution for perjury," and the Judge's questioning had "enabled the judge to assess John Doe's credibility and reliability." *Id.* at A14.

Regarding petitioner's request for an evidentiary hearing, the court stated that the request would be reviewed only for plain error. No plain error had occurred, the court concluded, because petitioner had not offered any evidence to refute the affidavits and therefore had failed to raise a "significant disputed factual issue" requiring a hearing. Pet. App. A16-A17.

ARGUMENT

On June 21, 1999, this Court denied the petition for a writ of certiorari in *Wilson* v. *United States*, 119 S. Ct. 2383, a case arising from the same underlying facts as this petition, and involving issues identical to those presented here.[2] Petitioner's case is no more worthy of this Court's review.

1. Petitioner argues (Pet. 6-11) that the district court incorrectly relied on the affidavits of the issuing judge and the requesting officer to find probable cause.

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[2] Both petitioner and Wilson were named in the May 2, 1995 search warrant, both resided in the residence searched, and both were indicted based on items seized during that search. Wilson joined petitioner's motion to suppress, which was denied. Pet. App. A2-A5. In his petition for a writ of certiorari (at ii, 11), *Wilson* v. *United States*, *supra* (No. 98-9497), Wilson requested review of a question essentially identical to the first question presented in this case.

He claims that the Fourth Amendment requires that a court reviewing the constitutionality of a search warrant confine itself to the assessment of records made contemporaneously with the warrant proceeding. Petitioner does not, however, identify a division in circuit authority, or any other reason why review by this Court is currently appropriate.

Petitioner is, moreover, incorrect on the merits. The Fourth Amendment declares that search warrants shall not issue "but upon probable cause, supported by Oath or affirmation." U.S. Const. Amend. IV. Nothing in the Fourth Amendment requires that the oath or affirmation or the basis for probable cause be reduced to writing. The courts of appeals have, as a result, concluded not only that a judge may issue a warrant based on sworn testimony outside the warrant affidavit, see *United States* v. *Clyburn*, 24 F.3d 613, 617 (4th Cir.) (upholding warrant because oral testimony at warrant hearing supplied basis for issuing judge's finding that informant was reliable), cert. denied, 513 U.S. 907 (1994), but also that the Constitution does not require that such supplemental information be recorded, see *United States* v. *Shields*, 978 F.2d 943, 946 (6th Cir. 1992) ("The Fourth Amendment does not require that statements made under oath in support of probable cause be tape-recorded or otherwise placed on the record or made part of the affidavit."). See also *Clyburn*, 24 F.3d at 617 (citing cases from the Third, Fifth and Eighth Circuits). If the Constitution does not require contemporaneous recording of the evidence supporting probable cause, it surely cannot require that the reviewing court ignore all evidence other than the

contemporaneous recording when assessing whether probable cause was established.[3]

For related reasons, courts have consistently upheld warrants based on non-contemporaneous testimony regarding what occurred during the warrant hearing. See, *e.g.*, *United States* v. *Causey*, 9 F.3d 1341, 1343 (7th Cir. 1993) (upholding pseudonym warrant based on requesting officer's testimony that issuing judge knew informant was using pseudonym), cert. denied, 511 U.S. 1024 (1994); *United States* v. *Smith*, 9 F.3d 1007, 1012 (2d Cir. 1993) (upholding warrant based on issuing Judge's testimony at suppression hearing that he had relied on sworn testimony outside the affidavit). Indeed, if petitioner were correct, there would be no need for a suppression hearing when a warrant is challenged, as the reviewing court would be confined to written and electronically-recorded evidence; it would have no need for oral testimony regarding what actually occurred. In sum, the United States is aware of no authority supporting petitioner's position.[4]

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[3] Petitioner's reliance (Pet. 8) on *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971), is misplaced. There, the Court indicated that an "insufficient affidavit cannot be rehabilitated" through testimony that was "not disclosed to the issuing magistrate." *Ibid.* Here, the question is whether an affidavit can be supplemented by testimony that *was* disclosed to the magistrate in order to give a fuller and hence more accurate picture of whether the warrant was issued on the basis of probable cause.

[4] Petitioner apparently relies (Pet. 10) on Federal Rule of Criminal Procedure 41, which requires a contemporaneous recording of search warrant proceedings before a federal court. Rule 41 does not apply in petitioner's case because the warrant in question was issued by a state court and executed by state police officers. See, *e.g.*, *Clyburn*, 24 F.3d at 616. Petitioner does not suggest that the Constitution incorporates the procedural requirements of Rule 41.

To the extent that petitioner challenges the court of appeals' finding that the warrant in this case was based on probable cause (Pet. 11), that challenge is factbound and without merit. The confidential informant, under oath, indicated that he personally had bought cocaine from petitioner; that petitioner had told him that a large shipment of cocaine had arrived; and that he saw petitioner bring a clear bag full of smaller cocaine packages up from his basement. Pet. App. A2-A3, C3-C4. The judge that issued the warrant had the opportunity to question the informant, observe his demeanor, and make a reliability determination. *Id.* at A13, C6-C7. Because the judge that issued the warrant had a "'substantial basis for . . . conclud[ing]' that probable cause existed," the courts here properly declined to set that determination aside. *Illinois* v. *Gates*, 462 U.S. 213, 238-239 (1983) (quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960)).

2. Petitioner also argues (Pet. 12-15) that he is entitled to an evidentiary hearing to challenge Judge Gamberdino's and Officer Howard's affidavits. The court of appeals was correct to review that claim only for plain error, see Fed. R. Crim. P. 52(b), and it is clear that the district court did not commit an "obvious" error that "affect[ed] [petitioner's] substantial rights" by failing sua sponte to hold an evidentiary hearing concerning the content of the affidavits. See *United States* v. *Olano*, 507 U.S. 725, 732-733, 734 (1993).

Petitioner claims (Pet. 13) that he is entitled to a hearing because "[i]t is beyond real dispute that the statements in [Judge Gamberdino's] affidavit are conclusionary in form and ambiguous." There is no need, however, to hold a hearing to consider that type of claim; it can be resolved by looking to the affidavit itself, and already has been—to petitioner's detriment.

Petitioner, moreover, offered no evidence to suggest that Judge Gamberdino's or Officer Howard's accounts were untruthful or incorrect. Under those circumstances, the district court did not commit plain error by failing to hold the hearing that petitioner never requested.

Finally, petitioner claims (Pet. 12) that the "importance of review" requires that oral testimony, instead of written affidavits, be offered in support of a finding of probable cause. The argument is difficult to reconcile with petitioner's contrary argument that, when reviewing whether probable cause was established, the court should look at the written record alone. In any event, petitioner offers no explanation why a court cannot review testimony equally well in written or oral form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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